

December 15, 1994

Mr. Lloyd I. Unebasami
Interim Administrator
State Procurement Office
Department of Accounting and General Services
P.O. Box 119
Honolulu, Hawaii 96810-0119

Dear Mr. Unebasami:

Re: List of Persons Attending Bidders' Conference and
Notices of Intent to Bid

This is in reply to your memorandum dated September 14, 1994, requesting an advisory opinion from the Office of Information Practices ("OIP").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an agency must disclose the following types of government records, or information therein, before the deadline for the submission of bids for a government contract:

1. Records identifying individuals, persons, organizations, or companies ("persons") that have received or picked up a bid solicitation from a government agency;¹
2. Records identifying persons attending a bidders' conference; and
3. Records identifying persons or organizations that have

¹Under the UIPA, the term "person" includes "an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity." Haw. Rev. Stat. § 92F-3 (Supp. 1992).

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submitted a notice of intent to bid or a bid.

BRIEF ANSWER

Under the UIPA, an agency is not required to disclose government records which, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function. Haw. Rev. Stat. § 92F-13(3) (Supp. 1992).

The UIPA's legislative history indicates that among other records protected by this exception, it applies to information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency. The pre-enactment history of the UIPA also recognizes that the premature release of certain government procurement information, such as before a contract award has been made, "might undermine the public purpose of the bid process."

We believe that before the deadline for the submission of a bid to an agency, the disclosure of information that would identify persons who have: (1) picked up or received a bid solicitation; (2) attended bidders' conferences, or (3) submitted a notice of intent to bid or a bid itself, could increase the cost of government procurements or give a manifestly unfair advantage to potential bidders. If a bidder knows who is, or may be, competing against it for a government contract, this information would likely affect the bidder's price proposal, or quite possibly lead to collusion between bidders.

Accordingly, it is our opinion that before the deadline for the submission of a bid to an agency, an agency is not required to disclose the identities of persons that have: (1) picked up or received a bid solicitation; (2) attended bidders' conferences, or (3) submitted a notice of intent to bid or a bid itself. It is further our opinion that after the deadline for the submission of a bid to an agency, this information must be made available for public inspection and copying under section 92F-12(a)(3), Hawaii Revised Statutes, which requires the public availability of government purchasing information except as provided in section 92F-13, Hawaii Revised Statutes.

FACTS

On August 10, 1994, the Procurement Office of the State Department of Accounting and General Services, conducted a mandatory bidders' conference attended by persons interested in a

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solicitation for bids to provide a new Statewide telecommunications system.

According to Mr. Grant Turner of the State Procurement Office, the names of all persons picking up bid solicitation were recorded by State Procurement Office personnel. At the mandatory bidders' conference, each person attending the conference was given a form to complete setting forth their name and address, the name of their company, and the name of any other company they were representing. Mr. Turner explained that the State Procurement Office did not circulate a conference sign-in sheet because it wanted to prevent those attending the conference from learning the identities of the other persons attending the conference, believing that this information could affect the integrity of the procurement process.

On August 30, 1994, Unisys Corporation, a representative of which had attended the mandatory bidders' conference, requested the State Procurement Office to provide it with "a list of the names and organizations of those persons attending the mandatory bidders' conference on August 10, 1994."

By memorandum to the OIP dated September 14, 1994, you requested an advisory opinion concerning the State Procurement Office's obligation to disclose, before the deadline for the submission of bids, government records that would reveal the identities of persons who have: (1) attended a bidders' conference; (2) picked up or received a bid solicitation, or (3) submitted a notice of intent to bid on a State contract, or a bid itself.

In your memorandum to the OIP, you asserted that disclosure of certain bid information before the selection of a winning bidder could jeopardize the integrity of the bidding process, and have the effect of "reducing competition and increasing the cost of a product or service to the State." Memorandum from Lloyd I. Unebasami to Kathleen A. Callaghan, Office of Information Practices Director, dated September 14, 1994. Your memorandum explained:

Our experience has shown that a bidder's uncertainty regarding its competition for a State contract or project has the effect of eliciting a better price from a bidder. A bidder will typically assume normal competition for a given commodity, and prepare a price in light of that competition. However, if a bidder is aware of his

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specific competition (i.e. particular companies), prices are prepared after considering these specific companies. In a worse case scenario, the bidder may be aware that there is no competition and would subsequently have little incentive to offer its best price. To illustrate the detrimental impact of the policy requiring disclosure of documents such as those listed above, the following sole bidder scenario is described:

The State issues an IFB for a project and requires bidders to file an Intent to Bid. Only one company files an intent to bid. The sole company requests disclosure of the Intent to Bid documents before bid opening. With the knowledge that they are the only interested company the bidder prepares and submits its proposal.

This scenario demonstrates the effects of prematurely disclosing bid information. Had the bidder anticipated competition, pricing would have reflected that expectation. A primary goal of sealed bidding is to create an environment conducive to competition. And herein lies the frustration of government function: disclosure of critical bid information prohibits the government from most effectively procuring a product or service.

Our contention is not that lists of bidders, conference attendees, or intent to bid forms are documents that should not be disclosed but rather that they are documents that should not be disclosed until after a winning bidder has been selected.

Memorandum from Lloyd I. Unebasami, Interim Director, State Procurement Office, to Kathleen A. Callaghan, OIP Director, dated September 14, 1994 (emphases in original).

In a letter to the OIP dated October 13, 1994, H. William Sewake, the Manager of the Department of Water Supply, County of

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Maui, also requested the OIP for an opinion concerning whether an agency must disclose the names of persons who have filed "Intent to Bid" before bid opening, stating:

We are concerned that a bidder may "pad" his bid if he knew he would be the only bidder. If this happens, we contend it would not be in the best interests of the public.

Letter from H. William Sewake, Manager, Department of Water Supply, County of Maui to Kathleen A. Callaghan, OIP Director, dated October 13, 1994.

DISCUSSION

I. INTRODUCTION

The UIPA states that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992).

The question presented is one of first impression for the State of Hawaii, in that neither the OIP nor Hawaii's courts have opined concerning an agency's obligation under the UIPA to disclose information that would identify persons who have picked up or received bid solicitations, attended bidders' conferences, or submitted a notice of intent to bid or a bid itself.

II. PUBLIC AVAILABILITY OF "GOVERNMENT PURCHASING INFORMATION, INCLUDING ALL BID RESULTS"

A. Section 92F-12(a)(3), Hawaii Revised Statutes

In addition to the UIPA's general rule that all government records are open to public inspection unless access is closed or restricted by law, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records, or information set forth therein, that must be made available for public inspection and copying "any provisions to the contrary notwithstanding." With respect to the list of records set forth in section 92F-12, Hawaii Revised Statutes, the UIPA's legislative history provides:

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In addition, however, the bill will provide, in Section -12, a list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed. As to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable. This list should not be misconstrued to be an exhaustive list of the records which will be disclosed . . . This list merely addresses some particular cases by unambiguously requiring disclosure.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphases added).

Section 92F-12(a)(3), Hawaii Revised Statutes, provides that any provision to the contrary notwithstanding, each agency shall make available for public inspection and copying "[g]overnment purchasing information, including all bid results, except to the extent prohibited by section 92F-13." Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1992).

We have previously noted that section 92F-12(a)(3), Hawaii Revised Statutes, was included in the UIPA largely as a result of the recommendations set forth in Volume I of the Report of the Governor's Committee on Public Records and Privacy (1987).² With respect to government purchasing information, this report states:

The next issue raised was the availability of **bid documents and results**. There was, however, very little dispute over this issue. It was agreed that documents and results are available though not until the time of the award since the premature release of information might undermine the public purpose of the bid process

Also raised was the availability of **government spending information**. The basic

²The UIPA's legislative history recognizes the important role played by the Governor's Committee on Public Records and Privacy. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093 (1988).

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thrust is that anytime taxpayer money is spent, the taxpayers have a right to see how it was spent. See Joseph Bazemore, Hawaii Building and Construction Trades Council, AFL-CIO (II at 199 and I(H) at 35-37). See also Kelly Aver (I(H) at 2), who felt that such information should be available to monitor abuse. To some degree, this is covered by issues discussed above under government employees, public works, and bid results. There is also, however, a desire to ensure that all **State and county purchasing information** is available. See James Wallace (I(H) at 16-17). As a Committee member put it: "Government should never stop short of complete openness in this area." If for no other reason, taxpayers need the assurance of knowing that this information is accessible. Moreover, it is unlikely that this information should be much of a concern and vendors who do business with the State should not have an expectation of privacy as to that sale.

Vol. I Report of the Governor's Committee on Public Records and Privacy at 114 (1987) (emphases added, bold face in original).

It is our opinion that records that would identify persons who have attended bidders' conferences, picked up bid solicitations, or submitted a notice of intent to bid or a bid itself constitute "government purchasing information," since these records are an integral part of an agency's procurement process.

However, section 92F-12(a)(3), Hawaii Revised Statutes, contains an exception that is not present in any of the other paragraphs of this subsection. Specifically, it states that government purchasing information shall be made available "except to the extent prohibited by section 92F-13." In previous OIP opinion letters³, we concluded that this phrase was intended by the Legislature to permit an agency to withhold government purchasing information, the disclosure of which would result in the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes.

³See OIP Op. Ltr. No. 90-15 (Apr. 9, 1990); OIP Op. Ltr. No. 91-14 (Aug. 28, 1991); OIP Op. Ltr. No. 94-17 (Sept. 12, 1994); OIP Op. Ltr. No. 94-18 (Sept. 20, 1994).

B. Records That Must Be Confidential To Avoid the Frustration of a Legitimate Government Function

The legislative history of the UIPA provides examples of records that may be withheld by an agency if their disclosure would result in the frustration of a legitimate government function, including:

- (3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining;

S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (emphasis added).

The example quoted above in Senate Standing Committee Report No. 2580 was taken verbatim from an exemption contained in section 2-103 of the Uniform Information Practices Code ("Model Code"), drafted by the National Conference of Commissioners on Uniform State Laws, and upon which the UIPA was modeled by Hawaii's Legislature. Section 2-103(a)(5) of the Model Code permits an agency to withhold "information which, if disclosed, would frustrate government procurement or give an advantage to any person proposing to enter into a contract or agreement with an agency." The commentary⁴ to this exception explains:

Subsection (a)(5) protects the integrity of the procurement and competitive bidding process. A few states include this type of provision in their freedom of information statutes. Mich Comp. Laws Ann. §15.243(1)(j); N.Y. Pub. Off. Law §87(2)(c);

⁴The UIPA's legislative history provides that the commentary to the Model Code should guide the interpretation of similar provisions found in the UIPA where appropriate. See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988).

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Vt. Stat. Ann. tit. 1, § 317(b)(13). Most states, however, have legislation specifically regulating the procurement practices of state or local government, e.g., Ga. Code Ann. §§23-1702, -1711; 40-1909-1913; 95A-1205. In that case, subsection (a)(5) does not restrict access to any information expressly made available to the public by that legislation. Otherwise, an agency in its discretion could use this exemption to withhold information unless, under the circumstances, state law prohibits disclosure of procurement and bidding information altogether. See Section 2-103(a)(11). Once a contract is let or a purchase is made, the exemption generally will no longer apply.

Model Code § 2-103 commentary at 17 (1980) (*italics in original, emphases added*).

In OIP Opinion Letter No. 94-18 (Sept. 20, 1994), we opined that the disclosure of rating sheets used to evaluate proposals for the construction of a State Convention Center before the execution of a contract or agreement with the convention center developer would likely raise the cost of government procurements or give a manifestly unfair advantage to one of the four design/build teams who had submitted proposals. We reached this conclusion because the Convention Center Authority was engaged in negotiations with the developer that had been selected, and because disclosure of the evaluation scores would create the strong possibility that the selected developer would not make changes to its proposal requested by the State without additional cost to the State. In the event that negotiations with the selected developer broke down, we also found that disclosure of the evaluations scores could give a manifestly unfair advantage to the remaining developers that had submitted design/build proposals.

In this opinion, we must determine whether, before the deadline for the submission of a bid to an agency, the disclosure of information that would identify persons who have attended bidders' conferences, picked up or received a bid solicitation, or submitted a notice of intent to bid or a bid itself, would raise the cost of government procurements, or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency.

The State Procurement Office asserts that if bidders are

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informed of the identities of other persons who intend to bid on a contract, or who have attended a bidders' conference or submitted a bid itself, it may affect the competitiveness of a bidder's price proposal, and thus, affect the cost to the State.

The State Procurement Office states that, in a worst case scenario, if a person is able to confirm that it is the only bidder for a contract, this fact will significantly affect the bidder's price proposal.

The Texas Attorney General has opined that under an exception in the Texas Open Records Act applicable to "information, which if released, would give an advantage to competitors or bidders," an agency is not required to disclose the identity of those who have submitted bids before the last day of bidding. See Texas Open Records Decision No. 46 (1974). The rationale for this conclusion was further explained in Texas Attorney General Opinion MW-591 (1982):

The policy reason for withholding the identities of bidders is obvious. Merely knowing the identities of other bidders could furnish a bidder with insights concerning the other bidders capabilities which he may then use in structuring his own bid.

Analogously, the Federal Acquisition Regulations, which govern the procurement practices of all federal agencies, also require contracting officers to safeguard information concerning the identity and number of bids received and to disclose this information only to government employees on a need-to-know basis. See 48 C.F.R. §§ 14.401 and 15.411 (1993).

Similarly, the New York Freedom of Information Act contains an exemption for records which if disclosed, "would impair present or imminent contract awards or collective bargaining negotiations." N.Y. Pub. Off. Law § 87(2)(c) (McKinney 1988). The New York Committee on Open Government, an agency with functions similar to those of the OIP, has opined that under this exemption, before the deadline for the submission of bids to an agency, an agency may withhold access to records that would identify potential or actual bidders.⁵

We believe that before the date and time for opening bids,

⁵Telephone conversation between OIP Staff Attorney Hugh R. Jones and Robert J. Freeman, Executive Director, New York Committee on Open Government on September 29, 1994.

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the disclosure of the number and identities of persons who have picked up or received an agency bid solicitation, attended a bidders' conference, or submitted a notice of intent to bid or a bid itself, would significantly undermine the integrity of the government procurement process, and likely raise the cost of government procurements. The purpose of sealed bidding is to promote competition and prevent collusion in the award of government contracts, and the disclosure of information that would identify prospective bidders would, in our opinion, adversely affect a competitive bidding process, raise the cost of government procurements, and give a manifestly unfair advantage to bidders competing for a government contract. The pre-enactment history of the UIPA also recognizes that the premature release of certain government procurement related information could undermine the integrity of a public procurement process.

We agree with the rationale of the Texas Attorney General's Open Records Decision. If a bidder knows the identity of other bidders against whom the bidder will be competing, this information would furnish the bidder with information that would affect the structuring of its bid. This is particularly true, as the State Procurement Office points out, when only one bidder has expressed interest in submitting a bid on a government contract.

However, even in situations involving multiple bidders, we believe that the disclosure of information that would identify potential bidders could significantly affect the price proposals submitted by those bidders, and give a manifestly unfair advantage to the bidders.

Accordingly, it is our opinion that, before the deadline for the submission of bids, an agency is not required by the UIPA to disclose government records that would identify persons who have: (1) picked up or received bid solicitations, (2) attended a bidders' conference, or (3) submitted a notice of intent to bid or a bid on a government contract. We believe that the disclosure of such information before the deadline for the submission of bids would result in the frustration of a legitimate government function by raising the cost of government procurements or by giving the bidders a manifestly unfair advantage over the contracting agency or other bidders.

In contrast, we do not believe that the disclosure of this information after the submission deadline for bids has passed would result in the frustration of a legitimate government function. Accordingly, pursuant to section 92F-12(a)(3), Hawaii Revised Statutes, after the deadline for the submission of bids has passed, this information would not be protected from public

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inspection and copying under the UIPA.

CONCLUSION

For the reasons set forth above, it is our opinion that under the UIPA's frustration of legitimate government function exception, an agency is not required to disclose, upon request, information that would identify persons who have: (1) picked up or received an agency bid solicitation, (2) attended a bidders' conference, or (3) submitted a notice of intent to bid or a bid itself, until after the deadline for the submission of bids.

Please contact me at 586-1404 if you should have any questions regarding this opinion letter.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

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c: H. William Sewake, Manager
Maui Department of Water Supply

Honorable Robert A. Marks